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No. 73-2066

# In the Supreme Court of the United States

OCTOBER TERM, 1974

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NATIONAL INDEPENDENT COAL OPERATOR'S ASSOCIATION, ET AL., PETITIONERS

*v.*

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE RESPONDENTS

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-14a) is reported at 494 F. 2d 987. The opinion of the district court (Pet. App. B, pp. 1b-15b) is reported at 357 F. Supp. 509.

### JURISDICTION

The judgment of the court of appeals was entered on February 11, 1974. A timely petition for rehear-

ing with a suggestion of rehearing *en banc* was denied on April 24, 1974. The petition for a writ of certiorari was filed on July 23, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the procedures by which the Secretary of the Interior assessed civil penalties under the Federal Coal Mine Health and Safety Act of 1969 before March 15, 1973, were invalid.

## STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth as indicated at pp. 2-3 of the government's Brief in *Morton* v. *Delta Mining, Inc.*, No. 74-521.

## STATEMENT

In our Brief in the related case of *Morton* v. *Delta Mining, Inc.* (No. 74-521), which has been consolidated for argument with this case, we summarized the statutory scheme, pertinent regulations, and administrative procedures followed by the Secretary of Interior in assessing civil penalties under the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. 801, *et seq.* (Gov't Brief, pp. 3-16).[1] In *Delta*, the Secretary sought to enforce his assessment orders against the respondent coal mine

[1] We have served a copy of our Brief in *Delta* on petitioners' counsel in this case.



operators by suits for enforcement in the district courts; under the Act, the operators were entitled to a trial *de novo* on all relevant issues (Section 109(a)(4)).

The procedural context of this case differs from that in *Delta*, although the issue presented in both cases is the same. Petitioners here are an association of coal mine operators and various individual coal mine operators. They sued in the United States District Court for the District of Columbia for an injunction and a declaratory judgment, claiming that the Secretary's regulations establishing administrative procedures for assessing civil penalties (30 C.F.R. Part 100 (1972 ed.)) were contrary to the Act (App. 11-27).

In March 1973, the district court, on motions for summary judgment, declared invalid the then current Part 100 procedures for assessing civil penalties[2] and permanently enjoined the Secretary from continuing to utilize or enforce those procedures. The Secretary had argued that the language in Section 109(a)(3), pertaining to a "decision incorporating * * * findings of fact" applied only when the operator had requested a "public hearing" under that Section and one had been held; the District Court, however, agreed

[2] The orders the Secretary sought to enforce in *Delta* were issued under the regulations published January 16, 1971 (App. 4). As noted in our *Delta* Brief (p. 6, n. 8), these regulations were modified in certain respects, not here significant, in June 1972. These modified regulations were enjoined by the district court in this case; they are contained in an Addendum to the government's Brief in *Delta*, pp. 7a-13a.

with petitioners that the findings of fact requirement applied in all cases, regardless of whether an administrative hearing was held. The court of appeals reversed, concluding that the language of Section 109 (a)(3) was "logically capable" of either construction, but that the pertinent legislative history supported the Secretary's interpretation (Pet. App. A, pp. 6a-7a, 11a-14a). Moreover, the court pointed out that findings of fact were not needed "when there is no dispute and the operator evidences his satisfaction with the proposed penalty by choosing not to request a hearing" (*id.* at p. 10a).

## ARGUMENT

The procedures to which petitioners object, and which the district court declared invalid and enjoined, are no longer utilized by the Secretary in assessing civil penalties under the Coal Mine Health and Safety Act.[3] As we pointed out in our Brief in *Delta* (p. 16), a revised Part 100 became effective on August 1, 1974, after the decision of the court of appeals in this case.[4] Under the new procedures, all proposed assessments identify not only the notice of violation and the amount of the penalty, but also contain formula determinations ("penalty points") pertaining to each of the six statutory criteria. Accordingly, for every charged violation the coal mine operator is now given "information showing * * * in what manner the six statutory criteria ha[ve] been applied for purposes of determining the penalty amount" (Pet. Br., p. 25).[5] Therefore, the formula system now in effect substantially meets petitioners' objections to the former procedures.

[3] We do not believe, however, that this case is moot since a declaratory judgment that the prior procedures were invalid might affect the Secretary's ability to obtain judicial enforcement of penalties assessed under those prior procedures.

[4] As the court of appeals noted, similar procedures had been published before the decision below (Pet. App. A, p. 4a n. 12); the current procedures became effective thereafter.

[5] Petitioners apparently also contend that the administrative procedures that the Secretary used in making his initial determination of the penalty amount were inadequate, both because there was allegedly no finding that the violation had in fact occurred and because there was no "meaningful consideration" of the statutory factors (Pet. 6). But the Secretary's assessment orders have always incorporated by reference the notices of violation, and these notices contain findings by the Coal Mine Inspector, as the "Authorized Representative" of the Department of the Interior, that the specified violation occurred. See, *e.g.*, government *Delta* Brief Add., p. 22a. There is thus no possible doubt concerning the violations upon which the proposed and final assessment orders are based; if the operator disputes their occurrence he may request a hearing and put the Secretary to his proof. If he does not, the formal finding is made before the case is referred for litigation.

The proposed order of assessment typically states that the statutory factors have been considered (see, *e.g.*, government *Delta* Brief Add., pp. 20a-21a), and the record indicates that in determining the amount of the assessment, the assessment officer relied on the regulatory guidelines, which incorporated the Secretary's conclusions concerning the relative weights to be given to the various factors (App. 41). Although petitioners may disagree with these conclusions, that does not indicate the factors were not meaningfully considered. Instead, the weight given to each factor is a matter of judgment specifically reserved to the Secretary. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-416; *Camp* v. *Pitts*, 411 U.S. 138.

In any event, those objections are not well taken. For the reasons set forth in our *Delta* Brief, we submit that the court of appeals correctly concluded that the Secretary's former Part 100 procedures complied with Section 109(a)(3) of the Act. As we there argued (Brief, pp. 18-27), the more natural reading of Section 109(a)(3) is that factual findings are required only when the mine operator has taken advantage of the opportunity for a public hearing, particularly since the operator is entitled to a trial *de novo* before judicial enforcement of an assessed penalty that the operator has refused to pay. The findings of fact requirement traditionally refers to the end product of a hearing and, under the Administrative Procedure Act (5 U.S.C. 554(a)(1)), a hearing is not essential before final agency action if a subsequent trial *de novo* is provided. Thus, the striking feature of Section 109(a)(3) is that the operator is even afforded an opportunity for a decision incorporating findings of fact after a hearing.

We therefore believe, as we stated in our *Delta* Brief (pp. 23-24), that Section 109(a)(3) on its face does not require factual findings in the absence of a hearing. But even if the statute could reasonably be read as imposing such a requirement, the legislative history of the statute is firmly against it. Section 109(a)(3) emerged in its present form from a Conference Committee, appointed to resolve differences between the House and Senate bills, yet the House and the Senate versions of the provision at issue here were in agreement: findings of fact were



required only after a hearing (*id.* at pp. 24-27). Beyond this, there is no reason why Congress would have provided for factual findings in the absence of a hearing. The administrative burden on the Secretary from such a requirement would be extraordinary (80,000 notices of violation are issued yearly) and, in view of the operators' opportunity for an administrative hearing and the availability of a trial *de novo*, it is at best doubtful whether any substantial benefits would be gained from such a requirement (*id.* at pp. 27-31).

We add only that the cases[6] upon which petitioners rely as indicating the necessity for administrative findings are cases in which a hearing has been held, or in which the agency findings are subject to review under the substantial evidence test (Pet. Br., pp. 15-16, 20-22).[7] In contrast, the issue

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[6] Petitioners also cite the General Accounting Office Report of July 5, 1972, criticizing the Secretary's assessment procedures (Pet. Br., pp. 16-17). That report specifically concludes that "a description of how the [statutory] factors were actually considered in determining a specific penalty does not have to be given in the proposed order of assessment sent to the mine operator" (*Delta* App., p. 90).

[7] *U.S.V. Pharmaceutical Corp.* v. *Secretary of Health, Education and Welfare*, 466 F.2d 455 (C.A.D.C.), upon which petitioners rely, is of the latter type, see 21 U.S.C. 355(h). The court there found summary procedures inadequate under a regulation which required the presentation of facts justifying relief in order to obtain a hearing after the agency had taken adverse action. In contrast, Part 100 has never required more than a simple request for a hearing, and no penalty need be paid before a hearing is available.

In any event, the persuasiveness of *U.S.V. Pharmaceutical* as support for petitioners' position is dubious in light of this

here is whether such findings are necessary in the absence of any request for a hearing, where enforcement is only after a trial *de novo* in the district court. See 5 U.S.C. 554(a)(1); government *Delta* Brief, pp. 22-23, 28-34.

## CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals should be affirmed.

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Court's decision in *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 620-622, upholding the validity of the regulation which was at issue in *U.S.V. Pharmaceutical*, on the ground that:

> We cannot impute to Congress the design of requiring, nor does due process demand, a hearing when it appears conclusively from the applicant's "pleadings" that the application cannot succeed.

As the court of appeals in this case concluded, there is similarly no need for findings of fact when the affected party indicates, by not even requesting a hearing, that there is no genuine factual dispute (Pet. App. A, p. 10a).

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